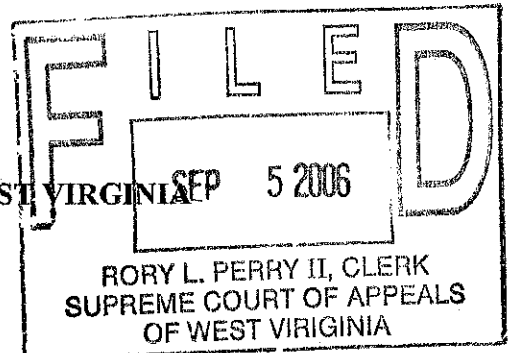


No. 33102

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**JOHN BARBINA, individually
and as parent of ANISSA BARBINA, an infant,
*Appellant and Plaintiff Below,***

vs.

**CHARLES CURRY and KELLY A. CURRY,
THE WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES, LORI GLOVER,
CLARK SINCLAIR, as Sheriff of Taylor County, West Virginia,
and VALLEY COMPREHENSIVE COMMUNITY MENTAL
HEALTH CENTER, INC.,
*Appellees and Defendants Below.***

**BRIEF OF APPELLEE VALLEY COMPREHENSIVE
COMMUNITY MENTAL HEALTH CENTER, INC.**

Tamara J. DeFazio, Esquire
W.Va. State Bar Id. No. 5130
J. Robert Russell, Esquire
W.Va. State Bar Id. No. 7788

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Exhibits

Exhibit A – Order Granting Defendant Valley Comprehensive Community Mental Health Center, Inc.’s Motion for Summary Judgment, entered March 23, 2005.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**JOHN BARBINA, individually
and as parent of ANISSA BARBINA, an infant,
Appellant and Plaintiff Below,**

vs.

**CHARLES CURRY, KELLY A. CURRY,
THE WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES, LORI GLOVER,
CLARK SINCLAIR, Sheriff of Taylor County, West Virginia,
and VALLEY COMPREHENSIVE COMMUNITY MENTAL
HEALTH CENTER, INC.,
Appellees and Defendants Below.**

**BRIEF OF APPELLEE VALLEY COMPREHENSIVE
COMMUNITY MENTAL HEALTH CENTER, INC.**

Appellee and defendant below, Valley Comprehensive Community Mental Health Center, Inc. (hereinafter "Valley"), by its counsel, Tamara J. DeFazio, J. Robert Russell and the law firm of Pullin Fowler & Flanagan, PLLC, respectfully submits the following Brief in response to the Brief of Appellants filed by John Barbina, individually and as parent of Anissa Barbina, an infant (hereinafter "Barbina"), the plaintiff below.

I. FACTUAL BACKGROUND

On October 30, 2001, John Barbina filed his Complaint, on behalf of himself and his minor child, Anissa Barbina, against Charles Curry, Kelly A. Curry, the West Virginia Department of Health and Human Resources (hereinafter "the Department") and Lori Glover. R. at pps. 1-6. On May 23, 2002, Barbina filed an Amended Complaint and named the Sheriff of Taylor County and Valley as party-defendants. R. at pps. 90-98. On July 10, 2003, plaintiff Barbina filed a Second Amended Complaint. R. at pps. 318-327.

On January 6, 2005, the Circuit Court of Taylor County, West Virginia, held a hearing in regard to Valley's Motion for Summary Judgment. After reviewing the pleadings, depositions, answers to interrogatories and admissions on file, together with any other material relevant to the instant motion submitted by the parties, the circuit court granted Valley's Motion and entered judgment in favor of Valley on all claims. R. at pps. 512-517, Order Granting Defendant Valley Comprehensive Community Mental Health Center, Inc.'s Motion for Summary Judgment, entered March 23, 2005, a copy of which is attached hereto as Exhibit A for ease in reference. In so doing, the circuit court made specific findings of fact and conclusions of law.

Construing the pleadings and evidence in the light most favorable to the plaintiff, the circuit court made the following findings. Anissa Barbina was sexually assaulted and/or abused by her maternal grandfather, Charles Curry. R. at pps. 512-517, Order, march 23, 2005, at Findings of Fact, ¶¶ 5 and 15, pp. 3-4. As the circuit court found, the plaintiff's allegations centered around two (2) incidents of abuse. R. at pps. 512-517, Order, March 23, 2005, at Findings of Fact, ¶ 9, p.3. The first incident allegedly occurred prior to September 17, 1998, and the second incident allegedly occurred on Thanksgiving Day of 1999. R. at pps. 512-517, Order, March 23, 2005, at Findings of Fact, ¶ 9, p. 3. See also, R. at pps. 318-327, Second Amended Complaint, at ¶ 15. The circuit court also found it to be undisputed that Charles Curry did not reside in the same as home as Kelly Curry and Anissa Barbina. R. at pps. 512-517, Order, March 23, 2005, at Findings of Fact, ¶ 16, p. 4.

Plaintiff further alleged, and the circuit found it to be undisputed, that on or about September 17, 1998, Helen Lough, an employee of Valley was advised by plaintiff, Anissa Barbina, that she was being sexually assaulted and/or abused by Charles Curry. R. at pps. 318-

327, Second Amended Complaint, at ¶ 8. R. at pps. 512-517, Order, March 23, 2005, Findings of Fact, ¶ 5, p.3. Plaintiff also alleges, and the circuit court found it to be undisputed, that Helen Lough reported this suspected sexual assault and/or abuse to Kelly A. Curry, the child's natural mother, immediately after the statement was made to Ms. Lough by Anissa Barbina. R. at pps. 318-327, Second Amended Complaint, at ¶ 9. See also, R. at pps. 512-517, Order, March 23, 2005, Findings of Fact, ¶ 8, p.3.

Valley maintained that Ms. Lough reported the incident to the West Virginia Department of Health and Human Resources on September 18, 1998. R. at pps. 512-517, Order, March 23, 2005, Findings of Fact, ¶ 6, p.3. The circuit court found this fact to be in dispute, but concluded that it was not a genuine issue of material fact sufficient to preclude the grant of summary judgment. R. at pps. 512-517, Order, March 23, 2005, Findings of Fact, ¶ 7, p.3.

The circuit court specifically found that it was undisputed that Valley had no notice of any abuse to Anissa Barbina "prior to the notice given to Helen Jean Lough on September 17, 1998." R. at pps. 512-517, Order, March 23, 2005, Findings of Fact, ¶ 12, p.4. With regard to the second incident on Thanksgiving Day of 1999, plaintiff specifically alleged that during the period from September 17, 1998, until February of 2000, Kelly A. Curry, the natural mother of Anissa Barbina neglected Anissa by "refusing repeated requests" to keep Anissa in counseling and "willfully, wantonly, or intentionally stopped future counseling sessions for Anissa Barbina at Valley." R. at pps. 318-327, Second Amended Complaint, at ¶ 13.

For the following reasons, the circuit court's grant of summary judgment in favor of Valley was not only supported by the record, but was required by application of the law of the State of West Virginia. Viewing the Brief of Appellant filed by plaintiff through the prism of the

applicable standard of review, it is clear that the Circuit Clerk's Order granting summary judgment in favor of Valley should be affirmed.

II. DISCUSSION

A. The Standard for Review.

Although "[a] circuit court's entry of summary judgment is reviewed *de novo*," Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994), "[s]ummary judgment is not a remedy to be exercised at the circuit court's option; it must be granted when there is no genuine disputed issue of a material fact." *Powderidge Unit Owners Ass'n v. Highland Props.*, 474 S.E.2d 872, 878 (W.Va. 1996) (Emphasis added) citing, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Rule 56 of the West Virginia Rules of Civil Procedure is "'designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial,' if there essentially 'is no real dispute as to salient facts' or if it only involves a question of law." *Williams v. Precision Coil, Inc.*, 459 S.E.2d 329, 335 (W.Va. 1994). (Citations omitted).

B. Valley Is Entitled to Summary Judgment On the Issue of Negligence As Plaintiff Could Not Establish A Legal Duty On the Part of Valley To Report Suspected Child Abuse and Plaintiff Could Not Establish That Any Alleged Failure Of Valley In This Regard Proximately Caused the Alleged Injuries.

The circuit court aptly noted that, despite the factual dispute over whether Valley had, indeed, reported suspected child sexual abuse to the Department, plaintiff's claims against Valley must fail as a matter of law. The circuit court correctly found that, even assuming Valley did not report the suspected abuse to the Department, as alleged by plaintiff, plaintiff could not establish the elements of duty and proximate causation necessary to sustain the cause of action against Valley. R. at pps. 512-517, Order, March 23, 2005, Conclusion of Law, ¶¶ 1 and 3, p.4-5. This

decision was not only a just one, but also reflects a proper application and analysis of the law of the State of West Virginia.

West Virginia has never recognized a cause of action for the failure to report suspected child sexual abuse, whether that action is based upon statutory authority or common law. Nothing in the Appellant's Brief contradicts this basic fact. The circuit court correctly observed that this Court rejected a private cause of action for failure to report suspected child abuse in *Arbaugh v. Board of Education*, 591 S.E.2d 235 (W.Va. 2003). R. at pps. 512-517, Order, March 23, 2005, Conclusion of Law, ¶¶ 1 and 2, p.4-5.

It is the last statement in the analysis section of the *Arbaugh* decision that disposes of plaintiff's argument and demonstrates the intellectual integrity of the circuit court's decision to grant summary judgment in favor of Valley. Rejecting a private cause of action for failure to report pursuant to West Virginia Code § 49-6A-2 (2002), the *Arbaugh* Court articulated its rationale as follows:

[n]onetheless, we hesitate to extend a private cause of action by implication to any child injured by a non-reported abuser against the person responsible for reporting since substantial questions of causation are raised and the failure to report "would not in the direct sense be a proximate cause of the injury to the child." *Borne by Borne v. Northwest Allen County School Corp.*, 532 N.E.2d 1196, 1203 (Ind.App.1989). The problems with causation are further complicated when one considers that the statute conditions the reporting requirement on the exercise of judgment of an individual reporter who may become aware of a possible case of child abuse only through rumors, innuendo or second-hand reports. The diverse backgrounds, professions and occupations represented in the statutorily defined class of persons required to report make it all the more difficult to define what conduct is required in various conceivable situations. Under such nebulous circumstances, we are unwilling to recognize a new and broad field of tort liability without express legislative designation of a private cause of action.

Arbaugh, 591 S.E.2d at 240-41. (Citations omitted).

The recognition by this Court that liability for failure to report suspected child abuse would represent a "new and broad field of tort liability" underscores the point made by the

circuit court which plaintiff cannot credibly deny – there is no common law duty to report suspected child abuse. *See, e.g., Marquay v. Eno*, 662 A.2d 272, 278 (N.H. 1995) (Any civil liability for a statutory violation would represent a “sweeping departure from a general common law rule of nonliability.”); *Letlow v. Evans*, 857 F. Supp. 676, 678 (W.D. Mo. 1994) (It would be “inappropriate for a court, particularly a federal court, to create a large and new field of state tort liability beyond what existed at common law.”).

If plaintiff now maintains that Valley owed a duty to report this suspected child abuse, separate and apart from the requirements of § 49-6A-2, he has come forward with no legal authority for this proposition. Moreover, the circuit court correctly found it undisputed that Valley had, indeed, reported the suspected abuse to the natural mother of the alleged victim. R. at pps. 512-517, Order, March 23, 2005, Findings of Fact, ¶ 8, p. 3. The claim asserted by plaintiff in the Second Amended Complaint has been that Valley failed to report the suspected abuse to the Department or a law enforcement agency. The circuit court correctly concluded that, absent § 49-6A-2, Valley had no duty to make such a report to a specific entity and that no private cause of action exists for failure to comply with § 49-6A-2.

Applying the rationale underlying *Arbaugh* to the instant situation, Valley was, and is, entitled to judgment as a matter of law on the grounds that plaintiff cannot legally sustain a negligence claim for failure to report suspected child abuse.

Likewise, the circuit court correctly noted that plaintiff could not sustain his burden of proving a causal link between any alleged failure to report by Valley and the alleged injuries. R. at pps. 512-517, Order, March 23, 2005, Conclusion of Law, ¶ 3, p. 5. This Court noted as much in *Arbaugh* by pointing out “substantial questions of causation are raised” and the fact that the “failure to report ‘would not in the direct sense be a proximate cause of the injury to the child.’”

Arbaugh, 591 S.E.2d at 240, quoting, *Borne by Borne v. Northwest Allen County School Corp.*, 532 N.E.2d 1196, 1203 (Ind.App.1989).

Simply put, as the Circuit Court's Order Granting Summary Judgment In Favor of Valley demonstrates, a proper and meaningful application of the *Arbaugh* decision negates the existence of any issue alleged by plaintiff to be a trialworthy one.

Finally, plaintiff's claims for his own emotional distress were properly rejected by the Circuit Court. Plaintiff did not contemporaneously observe or perceive the alleged injury to his daughter. R. at pps. 512-517, Order, March 23, 2005, Findings of Fact, ¶ 10, p. 3. Moreover, Valley was not on notice of any of the events prior to September 17, 1998, so as to provide an opportunity to prevent the same. In addition, it is undisputed that Valley reported the suspected abuse to the child's mother on September 17, 1998.

III. CONCLUSION

For all of the foregoing reasons, the Circuit Court of Taylor County properly granted Valley Comprehensive Community Mental Health Center, Inc.'s Motion for Summary Judgment. Valley was, and is, entitled to summary judgment in its favor and against the plaintiff with respect to plaintiff's claim in its entirety. Plaintiff cannot establish that a cause of action for failure to report child abuse is viable under West Virginia law. Furthermore, plaintiff's claim for negligence is void of the essential elements of duty and proximate causation. Finally, plaintiff cannot maintain a cause of action for negligent infliction of emotional distress based upon the Circuit Court's analysis. Therefore, Valley respectfully requests that the Circuit Court's Order granting summary judgment in favor of Valley Community Mental Health Center, Inc. be affected.

APPELLEE AND DEFENDANT
VALLEY COMPREHENSIVE COMMUNITY
MENTAL HEALTH CENTER, INC.
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MAR 29 2005

IN THE CIRCUIT COURT OF TAYLOR COUNTY, WEST VIRGINIA

ENTERED OF RECORD

JOHN BARBINA, individually
and as parent of ANISSA BARBINA,
an infant,

Plaintiff,

vs.

CIVIL ACTION NO. 01-C-74
[Judge Alan D. Moats]

MAR 23 2005
Civil ORDER BOOK
NO. 37 PAGE 503-504

CHARLES CURRY, KELLY A. CURRY,
THE WEST VIRGINIA DEPARTMENT
OF HEALTH AND HUMAN RESOURCES, and
VALLEY COMPREHENSIVE COMMUNITY
MENTAL HEALTH CENTER, INC.,

Defendants.

**ORDER GRANTING DEFENDANT VALLEY COMPREHENSIVE
COMMUNITY MENTAL HEALTH CENTER, INC.'S
MOTION FOR SUMMARY JUDGMENT**

On the 6th day of January, 2005, came the Defendant West Virginia Department of Health and Human Resources, by its counsel, Elisabeth H. Rose, and the law firm of Rose, Padden & Petty, L.C., and also came Defendants Charles Curry and Kelly Curry, by their counsel, Brent Van Deysen, and the law firm Gianola, Barnum & Wigal, L.C., and also came John Barbina, in his individual capacity and on behalf of Anissa Barbina, an infant, by his counsel, LaVerne Sweeney, and came Defendant Valley Comprehensive Community Mental Health Center, Inc. ("Valley"), by its counsel, Tamara J. DeFazio, and the law firm of Pullin, Fowler & Flanagan, PLLC, pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, Defendant Valley Comprehensive Community Mental Health Center, Inc.'s Motion for Summary Judgment and the Notice of Hearing previously filed herein in conjunction with said Motion and served upon the parties in a timely manner.

EXHIBIT A

WHEREUPON, after giving due consideration to the arguments of counsel and the memoranda filed with respect thereto, the Court hereby makes the following findings of fact and conclusions of law:

Findings of Fact

1. In his Second Amended Complaint, plaintiff John Barbina asserts on his behalf and on behalf of his daughter, Anissa Barbina, who was, at all times relevant hereto, an infant under eighteen (18) years of age, a claim against Valley for failing to report the alleged sexual assault of Anissa Barbina.

2. Specifically, it is alleged in plaintiff's Second Amended Complaint that Helen Lough and/or other persons employed by Valley either made or negligently failed to make a referral to the Child Protective Services Division of the West Virginia Department of Health and Human Resources with respect to the reported sexual assault of Anissa Barbina.

3. Plaintiff also alleges that Valley failed to make report to the Division of Public Safety and any law enforcement agency.

4. As required by the applicable law, this Court has reviewed the evidence, including pleadings, depositions, answers to interrogatories and admissions on file, together with any other material relevant to the instant motion submitted by the parties and has viewed the evidence in a light most favorable to the plaintiff for the purpose of deciding Valley's Motion for Summary Judgment.

5. In so doing, the Court finds that it is undisputed that on or about September 17, 1998, Helen Jean Lough, an employee of Valley, was advised by Anissa Barbina that she was sexually assaulted and/or abused by her grandfather, Charles Curry. Curry subsequently pled guilty to charges related to the sexual assault of Anissa Barbina.

6. Although Valley maintains that Helen Jean Lough reported the incident to West Virginia Department of Health and Human Resources on September 18, 1998, the West Virginia Department of Health and Human Resources denies receiving any report from Valley concerning the alleged sexual assault and/or abuse of Anissa Barbina which was reported to Valley on September 17, 1998.

7. Although it is disputed whether an employee of Valley communicated Anissa Barbina's report of having been sexually assaulted and/or abused by her grandfather, Charles Curry, to the West Virginia Department of Health and Human Resources, this Court finds that, as to Valley, this is not a genuine issue of material fact sufficient to preclude a grant of summary judgment for the reasons set forth in the Court's Conclusions of Law.

8. It is undisputed that Helen Jean Lough, an employee of Valley, advised Kelly Curry, the natural mother of Anissa Barbina, of Anissa Barbina's statement made on September 17, 1998, that she had been sexually assaulted by Charles Curry, her grandfather, immediately after the statement was made to Ms. Lough by Anissa Barbina.

9. Plaintiff alleges only two (2) incidents of abuse, with the first incident allegedly occurring prior to September 17, 1998, and the second incident alleged to have occurred on Thanksgiving Day of 1999.

10. There is no evidence that Plaintiff John Barbina witnessed either incident.

11. It is undisputed that the only incident of abuse of Anissa Barbina reported to Valley was the incident alleged to have occurred prior to September 17, 1998.

12. It is also undisputed that Valley had no notice of any abuse to Anissa Barbina prior to the notice given to Helen Jean Lough on September 17, 1998.

13. There is no evidence indicating that Valley made a report to the Division of Public Safety or any law enforcement agency regarding the incident of abuse occurring prior to September 17, 1998, and Valley does not claim to have made such a report.

14. Over a year passed between the September 17, 1998, report of abuse by Anissa Barbina and the second alleged incident of abuse which occurred on Thanksgiving Day of 1999.

15. It is not disputed that Charles Curry was the perpetrator of the alleged abuse.

16. It is likewise undisputed that Charles Curry did not reside in the same home as Kelly Curry and Anissa Barbina.

17. In addition to the claims for injuries to Anissa Barbina and numerous out of pocket expenses for the care and treatment of Anissa Barbina, plaintiff John Barbina also claims injuries to himself for "pain and suffering of body and mind (past, present, and future)."

Conclusions of Law

1. When the evidence is viewed in the light most favorable to the plaintiff, no private cause of action exists in this case for failure to report suspected acts of abuse pursuant to *W.Va. Code* § 49-6A-2. See, Syllabus Point 3, *Arbaugh v. Board of Education*, 591 S.E.2d 235 (W.Va. 2003). Plaintiff can point to no factual dispute present in this action that constitutes a genuine issue of material fact sufficient to preclude a grant of summary judgment in favor of Valley.

2. In addition, the Court has examined the last paragraph of the Arbaugh decision and the discussion about more egregious situations, such as where a victim or a victim's representative seeks to hold an eyewitness to the abuse liable. This Court finds this discussion inapplicable to the instant situation. The instant case does not involve any egregious circumstances or conduct warranting an exception to the rule announced in Arbaugh or otherwise permitting a cause of action for failure to report suspected child abuse.

3. Even if plaintiff's claims were cognizable pursuant to the dictates of Arbaugh, Valley would be entitled to a grant of summary judgment because Plaintiff John Barbina cannot establish, as a matter of law, that any acts or omissions of Valley proximately caused any injuries to himself or his ward.

4. Furthermore, plaintiff John Barbina cannot, as a matter of law, legally maintain a claim for pain and suffering, or negligent infliction of emotional distress, as he did not personally and contemporaneously perceive the injury-producing event. *See, Heldreth v. Marrs*, 425 S.E.2d 157 (W.Va. 1992); *Stump v. Ashland, Inc.*, 499 S.E.2d 41 (W.Va. 1997).

5. For these reasons, plaintiff cannot maintain this action against Valley and Valley is entitled to summary judgment in its favor and against plaintiff as a matter of law.

WHEREFORE, it is ORDERED that summary judgment be and summary judgment is hereby granted in favor of Valley Comprehensive Community Mental Health Center, Inc., and against the plaintiff on all claims set forth in this civil action and it is further ORDERED that Valley Comprehensive Community Mental Health Center, Inc., be dismissed as a party-defendant to the instant civil action with prejudice to the plaintiff.

An exception to this Order is hereby reserved to the plaintiff or any other party adversely affected by this ruling.

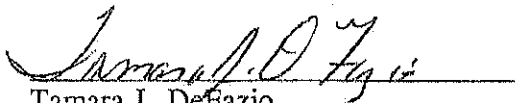
The Clerk of the Circuit Court of Taylor County, West Virginia, is hereby ORDERED to forward a certified copy of this Order to all counsel of record.

ENTER:

3-23-05


JUDGE

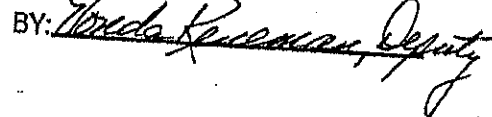
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A TRUE COPY FROM THE RECORD

ATTEST: ELANE M. BENNETT
CLERK OF THE CIRCUIT COURT OF TAYLOR
COUNTY, WEST VIRGINIA

BY:  Deputy

CERTIFICATE OF SERVICE

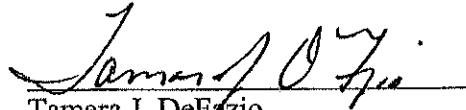
I hereby certify that I served the foregoing "**Brief of Appellee Valley Comprehensive Community Mental Health Center, Inc.**" upon the following counsel of record on the 5th day of September, 2006, by mailing true copies thereof by United States mail, postage prepaid, to the following counsel of record:

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